Information Duties in the Internet Era: Case Note on Content Services Ltd v. Bundesarbeitskammer

European Review of Private Law 2-2013 [643–660] © Kluwer Law International BV. Printed in the Great Britain.

Information Duties in the Internet Era: Case Note on *Content Services Ltd* v. *Bundesarbeitskammer*

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Abstract: The growth of the information society is enthusiastically embraced by the European Commission, which sees in the booming number of citizens purchasing goods online a strengthening of the internal market by way of an increase of cross-border trade. As is well known, contracts through which consumers buy products or demand services from traders that are not in their physical vicinity are considered to be distance contracts and are thus regulated by the Distance Selling Directive (DSD). Ironically, the DSD was not drafted with e-commerce in mind, which is understandable as the initial proposal dates from 1992. However, it was only adopted in 1997, and the fact that it still makes reference to decrepit distance communication techniques such as videophone and videotext, while failing to mention the internet even once, poses questions about its suitability to meet the technological progress of the last decade. An accurate illustration of this problem can be found in the 2012 *Content Services Ltd* v. *Bundesarbeitskammer* case. The analysis focused on determining whether sending a link via e-mail would meet the requirements of Article 5(1) of the DSD, which requires that the consumer receives or is given written confirmation of the relevant information or confirmation on another durable medium available.

Résumé: La croissance de la société de l'information est accueillie avec enthousiasme par la Commission européenne, qui voit dans le nombre en plein essor des citoyens qui achètent des biens en ligne un renforcement du marché intérieur par le biais d'une augmentation de commerce transfrontalier. Comme c'est bien connu, les contrats par lesquels les consommateurs achètent des produits ou demandent des services des commerçants qui ne sont pas dans leur voisinage physique sont considérés comme des contrats à distance, et sont donc réglementés par la Directive concernant la protection des consommateurs en matière de contrats à distance (DSD). Ironiquement, la Directive sur la vente à distance n'a pas été rédigée avec l'e-commerce à l'esprit, parce que la proposition originale est daté 1992. Cependant, il n'a été adopté qu'en 1997, et le fait qu'il fait encore référence à techniques décrépit de communication à distance telles que la visiophone et le vidéotexte, tout en omettant de mentionner l'Internet même une fois, pose des questions sur son justesse en répondre à l'évolution technologique de la dernière décennie. Une illustration exacte de ce problème peut être trouvée dans le *Content Services* cas. L'analyse vise à déterminer si l'envoi d'un lien par e-mail répond aux exigences de l'article 5 (1) de la DSD, qui exige que le consommateur reçoit ou est fournie une confirmation écrite des informations pertinentes ou la confirmation sur un autre support durable à sa disposition.

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Zusammenfassung: Das Wachstum der Informationsgesellschaft wird begeistert von der Europäischen Kommission aufgegriffen, welche in der steigenden Anzahl von Bürgern, die Güter über das Internet erwerben, eine Stärkung des Binnenmarktes, durch die Zunahme vom grenzüberschreitendem Handel, sieht. Wie allgemein bekannt ist, werden Verträge, welche Verbraucher nutzten um Produkte oder Dienstleistungen von Händlern zu erwerben, welche nicht in unmittelbarer Nähe sind, als Fernabsatzverträgen bezeichnet, und somit durch die Fernabsatzrichtlinie (97/7/EG) geregelt. Ironischerweise wurde die Fernabsatzrichtlinie nicht mit dem elektronischen Handel (eCommerce) im Hinterkopf entworfen, da der ursprüngliche Vorschlag aus dem Jahr 1992 stammt. Allerdings wurde er jedoch erst im Jahr 1997 angenommen, und die Tatsache, dass es immer noch Bezug auf veraltete Fernkommunikationstechniken wie Videotelefonie und Videotext nimmt, während er das Internet nicht einmal erwähnt, wirft Fragen, über die Fähigkeit den technologischen Fortschritt des letzten Jahrzehnts gerecht zu werden, auf. Eine genaue Darstellung dieses Problems kann in dem *Content Services* Fall von 2012 gefunden werden. Die Analyse konzentriert sich auf die Frage ob das Senden eines Links per E-Mail die Anforderungen von Artikel 5 (1) der Fernabsatzrichtlinie erfüllt, was voraussetzt, dass der Verbraucher eine schriftliche Bestätigung der relevanten Informationen erhält oder alternative eine Bestätigung durch ein anderes zur Verfügung stehendes dauerhaftes Medium.

1. Introduction

It is 2012, and information technology is here to stay. According to a Eurobarometer with data from 2009, on average 57% of European households had internet access,[1] while in 2011, this rate had gone up to 73%, which means three out of four European households can surf the world wide web.[2] To this we can add that almost 30% of European citizens are currently using a smartphone or other mobile device to go online, access retail sites, or purchase apps.[3]

The growth of the information society is enthusiastically embraced by the European Commission, which sees in the booming number of citizens purchasing goods online[4] a strengthening of the internal market by way of an increase of

1 DIRECTORATE-GENERAL INFORMATION SOCIETY AND MEDIA, *E-Communications Household Survey Summary*, October 2010, at 10, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_335_sum_en.pdf.

2 *Digital Agenda Scoreboard 2012*, at 6, available at http://ec.europa.eu/information_society/digital-agenda/scoreboard/docs/2012/scoreboard_digital_skills.pdf.

3 *Ibid.*, at 7; comScore, '1 in 8 European Smartphone Owners Conducted a Retail Transaction on Their Device', *Press Release*, 26 Jul. 2012, available at http://www.comscore.com/Press_Events/Press_Releases/2012/7/1_in_8_European_Smartphone_Owners_Conducted_a_Retail_Transaction_on_their_Device.

4 The average EU population percentage ordering goods from services online has increased from 30% in 2007 to 42.7% in 2011.

cross-border trade.[5] As is well known, contracts through which consumers buy products or demand services from traders that are not in their physical vicinity are considered to be distance contracts and are thus regulated by the Distance Selling Directive (DSD).[6] The protective ambit of this Directive consists in the creation of a number of rights consumers can benefit from in distance contracts, for example rights related to the provision of information by the seller or supplier.[7] The existence of such rights is motivated by the inability of consumers to assess the quality of goods or services before they are being delivered.[8] This is said to weaken their contractual standing, reduce the predictability of the contractual outcome, and leave consumers vulnerable to abuse.[9] For this reason, the rules enshrined in the DSD are an attempt to strengthen the consumer's position in such a manner that he will not be deterred from purchasing goods at a distance.

Ironically, the DSD was not drafted with e-commerce in mind, which is understandable as the initial proposal dates from 1992.[10] However, it was only adopted in 1997, and the fact that it still makes reference to decrepit distance communication techniques such as videophone and videotext, while failing to mention the internet even once,[11] poses questions about its suitability to meet the technological progress of the last decade.

An accurate illustration of this problem can be found in the 2012 *Content Services Ltd* v. *Bundesarbeitskammer* (hereinafter '*Content Services*') case.[12] The analysis focused on determining whether sending a link via e-mail would meet the requirements of Article 5(1) DSD, requiring that the consumer receives or is

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5 V. MAK, 'Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive', 19. *ERPL (European Review of Private Law)* 2011, pp. 25–42, at 26.

6 *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts*.

7 S. GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law', 39. *CMLR (Common Market Law Review)* 2002, pp. 269–293, at 276.

8 See, e.g., J. DICKIE, 'Consumer Confidence and the EC Directive on Distance Contracts', 21. *J. Consumer Pol'y (Journal of Consumer Policy)* 1998, pp. 217–229, at 217; G. BORGES & B. IRLENBUSCH, 'Fairness Crowded Out by Law: An Experimental Study on Withdrawal Rights', 163. *Journal of Institutional and Theoretical Economics* 2007, pp. 84–101, at 85; J. ROTHCHILD, 'Making the Market Work: Enhancing Consumer Sovereignty through the Telemarketing Sales Rule and the Distance Selling Directive', 21. *J. Consumer Pol'y* 1998, pp. 279–313; V. MAK, 2011, at p. 33.

9 E. MIK, 'Mistaken Identity, Identity Theft and Problems of Remote Authentication in E-Commerce', 28. *Computer Law & Security Review* 2012, pp. 396–402, at 397.

10 J. HORNLE *et al.*, 'Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts', in A.R. Lodder, H.W.K. Kaspersen (eds), *eDirectives: Guide to European Union Law on E-Commerce*, Kluwer Law International, The Hague 2002, p. 12.

11 K. HENDERSON & A. POULTER, 'The Distance Selling Directive: Points for Future Revision', 16. *International Review of Law Computers & Technology* 2002, pp. 289–300, at 290.

12 Case C-49/11, *Content Services Ltd* v. *Bundesarbeitskammer*, ECR [2012] forthcoming.

given written confirmation of the relevant information or confirmation on another durable medium available. In what follows, the case will be presented and analysed in this order: first, the facts of the case will be discussed. Then, after outlining the structure of the CJEU's judgment, the Court's rationale will be subjected to scrutiny and criticized.

2. Facts of the Case

Content Services, a limited liability company registered under English law, runs a branch in Germany (Mannheim). It operates a website (www.opendownload.de) in German, allowing its users to download either free or paid versions of software after registering via a form. This form asks for personal and contact details of the subscriber and has a small box that must be ticked for the completion of registration. The box refers to the terms and conditions of the website, and it specifies that users give up their right of withdrawal.[13] Finalizing the registration process is not possible without ticking this particular box. After filling in the form, the user receives an e-mail from Content Services Ltd with a username, password, and web link. Not long after this moment, the user receives another e-mail containing an invoice of EUR 96 for the costs of membership. The user is additionally reminded that he has waived his right of withdrawal and has no other option than to pay the fee.

Content Services Ltd is not the only European business using such an aggressive policy, clearly in violation of European consumer law. Two other German companies, Tropmi Payment GmbH and Antassia GmbH, are well-known operators of similar websites (www.top-of-software.de, www.software-and-tools.deand www.softwaresammler.de). Well-known on web forums are also the lawyers who send official reminders to the users, stating that they must pay the subscription fees according to the contract.[14] As case law reflects, most of these practices bothered the German online community around 2009–2010, and courts reacted to this by awarding damages to consumers who fell prey to this abusive practice. For instance, on 14 January 2010, the Regional Court of Mannheim (hereinafter 'Regional Court') delivered a judgment in a case where the plaintiff was a consumer who had created an account with www.opendownload.de and subsequently received a bill, as detailed in the process above. He did not respond and was later contacted by Content Services' lawyer,

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13 It does not fall within the ambit of the question referred to the Court of Justice of the European Union to look into the lawfulness of waiving the right of withdrawal, which would infringe Art. 21(1) of the Distance Selling Directive (DSD); see Opinion of Advocate General Mengozzi, Case C-49/11, *Content Services Ltd* v. *Bundesarbeitskammer*, para. 15.

14 See, for instance, the Netzwelt forum, with 800 posts on the practices of Content Service's former lawyer, Olaf Tank, available online at http://www.netzwelt.de/forum/vermeintliche-gratisdienste-abofallen/58476-opendownload-de-load2009-com-content-services-ltd-40.html.

who urged him to pay. The plaintiff then hired a lawyer himself, making the website's owner to back down from any claims. The case before the Regional Court dealt with damages arising from the payment of legal fees by the consumer. On basis of sections 133 and 155 Bürgerliches Gesetzbuch (BGB), the Court determined that there was no validly concluded contract and thus no valid ground for Content Services to ask for payment; the Court awarded damages in favour of the plaintiff.[15] In another case, charging subscription costs for downloading software that is also available for free (such as Mozilla Firefox) was considered, according to sections 3 *et seq.* UWG, an unfair commercial practice.[16] These practices still seem to exist: in 2012, for example, the Osnabrück police advised consumers who fell into the paid-subscription trap to file complaints with the local authorities.[17]

In the *Content Services* case, the *Bundesarbeitskammer*, the Austrian Chamber of Labor that is also active in the area of consumer protection, filed a complaint before the Commercial Court of Vienna (*HandelsgerichtWien*). Content Services lost the case and lodged an appeal with the Higher Regional Court of Vienna (*Oberlandesgericht Wien*) (hereinafter 'Higher Regional Court'). The Higher Regional Court was not satisfied that the consumer is properly informed about his right of withdrawal by the simple receipt of a link since the website behind is under the control of the service provider. However, considering that further interpretation of the DSD was necessary for the case before it, the Higher Regional Court stayed proceedings and referred a clarification of Article 5(1) of the DSD (implemented in the Austrian *Konsumentenschutzgesetz*) to the Court of Justice of the European Union (CJEU). The question addressed to the CJEU reads as follows:

> Is the requirement in Article 5(1) of [Directive 97/7] to the effect that a consumer must receive confirmation of the information specified there in a durable medium available and accessible to him, unless the information has already been given to him on conclusion of the contract in a durable medium available and accessible to him, satisfied where that information is made available to the consumer by means of a hyperlink on the trader's website which is contained in a line of text that the consumer must mark as read by ticking a box in order to be able to enter into a contractual relationship?[18]

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15 Landgericht (LG) Mannheim, Urteil vom 14 Jan. 2010 – 10 S 53/09 (Amtsgericht Mannheim).

16 LG Hamburg, Urteil vom 10 Dec. 2010 – 406 O 50/10.

17 'Polizeiinspektion Osnabrück, (POL-OS): Neue Forderungsschreiben eines bekannten Rechtsanwaltes beschäftigen die Polizei', 21 May 2012, available online at http://www.presseportal.de/polizeipresse/pm/104236/2256247/pol-os-neue-forderungsschreiben-eines-bekannten-rechtsanwaltes-beschaeftigen-die-polizei.

18 Case C-49/11, *Content Services Ltd* v. *Bundesarbeitskammer*, para. 25.

3. The Judgment of the Court of Justice

The CJEU chose to address the question referred to it from two perspectives: (1) interpreting the terms 'receive' and 'given' in the context of making information available according to Article 5(1) DSD and (2) establishing what a durable medium is in the meaning of the same Article.

3.1. The Interpretation of 'Receive' and 'Given' in the Context of Making Information Available According to Article 5(1) DSD

The CJEU established that it is unclear from the *travaux préparatoires* of the DSD what meaning the concepts 'receive' and 'given' have. For this reason, the Court interpreted these concepts on the basis of their usual meaning in everyday language.[19] The conclusion reached by the Court was that when referring to a process of transmission, the terms 'receive' and 'given' entail that the recipient of information must not take any action. Only sending a link does not meet this requirement as a consumer then does have to take action by clicking on it in order to be directed to the relevant information. The Court also tried to distinguish the wording of Article 5(1) DSD from the neutral formulation of Article 4(1), according to which the consumer is to be 'provided'[20] with the relevant information. It considered that 'receive' needs more effort on behalf of the supplier than 'provide' since the first would entail the giving of information and thus the consumer passive conduct, while the latter only means that information must be made available to the consumer. Furthermore, by looking at Recital 11 of the preamble to the DSD, the CJEU stated that the purpose of the DSD itself is to 'afford consumers extensive protection, by giving them a number of rights in relation to distance contracts'.[21] Since the consumer is not given sufficient information by being simply sent a link in an e-mail, it was held by the Court that such practice does not meet the standards of Article 5(1).

3.2. Establishing What a Durable Medium Is in the Meaning of the Same Article

With respect to the second issue, the Court first determined that the requirement of putting information in a written format or on a durable medium is functionally equivalent, as long as use of a new technology does 'fulfill the same functions as paper form'.[22] The main characteristics of a durable medium are that it stores information addressed to the consumer personally, that it does not allow for unilateral changes, that the information is accessible for an adequate period, and that consumers can reproduce it unchanged. These features are said to be in

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19 *Ibid.*, para. 32.

20 See Annex 1.

21 Case C-49/11, *Content Services Ltd* v. *Bundesarbeitskammer*, para. 36.

22 *Ibid.*, para. 41.

conformity with the definitions given by Article 2(f) of Directive 2002/65 on distance marketing of consumer financial services,[23] Article 2(12) of Directive 2002/92 on insurance mediation,[24] and Article 3(m) of Directive 2008/48 on consumer credit.[25] What is more, the CJEU also argued that the same features were presented by the Court of the European Free Trade Association (hereinafter 'EFTA Court') in the *Inconsult Anstalt* v. *Finanzmarktaufsicht* (hereainfter '*Inconsult Anstalt*') case.[26] *Inconsult Anstalt* was solved in the light of a distinction between different types of websites made by the European Securities Markets Expert Group in their 2007 Report.[27] The EFTA Court relied on the Report to determine that, in so far as websites can secure the unchanged reproduction of information, they are 'sophisticated' and can be considered durable mediums. The Court concluded that the Content Services website cannot be considered technologically advanced and thus cannot be viewed as a durable medium.

The Court thus rendered that Article 5(1) of the DSD must be interpreted in such a way that it does not allow for business practices to rely on the sending of hyperlinks through e-mail. It was also held that by doing so, information is neither 'received' by the consumer nor 'given' to him. Lastly, the Court submitted that a website such as the one operated by Content Services cannot be regarded as a durable medium. [28]

4. The Reasoning of the Court of Justice

Although it is not the first case dealing with online commerce,[29] *Content Services* is a milestone in the case law of the CJEU as it reflects new issues arising from the conclusion of contracts via the internet. Overall, the ruling is somewhat predictable since practices such as those brought by the Austrian Chamber of Labor before national courts must undoubtedly be confined, being in clear violation of various rules in the consumer *acquis*, among which those enshrined in the DSD. However, I believe that the CJEU puts forward flawed arguments to support this outcome. The *Content Services* judgment is vulnerable to critique for

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23 *Directive 2002/65/EC of the European Parliament and of the Council of 23 Sep. 2002 concerning the distance marketing of consumer financial services*, OJ L 271/16.

24 *Directive 2002/92/EC of the European Parliament and of the Council of 9 Dec. 2002 on insurance mediation*, OJ L 9/3.

25 *Directive 2008/48/EC of the European Parliament and of the Council of 23 Apr. 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC*, OJ L 133/66.

26 Case E-4/09, *Inconsult Anstalt* v. *Finanzmarktaufsicht* [2010] EFTA Court Report.

27 EUROPEAN SECURITIES MARKET EXPERT (ESME) GROUP, *Report on Durable Medium – Distance Marketing Directive and Markets in Financial Instruments Directive*, available online at http://ec.europa.eu/internal_market/securities/docs/esme/durable_medium_en.pdf.

28 Case C-49/11, *Content Services Ltd* v. *Bundesarbeitskammer*, para. 51.

29 See also Case C-336/03, *easyCar (UK) Ltd* v. *Office of Fair Trading*, ECR [2005] I-01947; Case C-489/07 *PiaMessner* v. *Firma Stefan Krüger* [2009] I-07315.

two reasons: (1) the Court's interpretation of the ordinary meaning of the terms 'receive' and 'given' lacks methodological consistency and (2) the Court fails to bridge the gap between the DSD's 'old school' understanding of technology and present-day reality. Each of these arguments shall now be discussed.

4.1. The Method of Interpretation by the Court

The Court's method of interpretation has been recurrently subjected to scrutiny.[30] Since European private law is supposed to be a self-standing source of rights and obligations, it was suggested that the primary methods of interpretation applied by the Court are literal, teleological, and comparative.[31] In the area of consumer law, while it was thought that the Court was restricted in its interpretive powers by factors such as the nature of the relevant directives,[32] case law shows the development of new methods. One of these methods was identified as 'cross-directive' interpretation,[33] and it implies that in order to clarify a European consumer law concept, the Court actively looks across the consumer *acquis*. While this method might have the added benefit of contributing to harmonization, it sometimes draws parallels between concepts that are in no way identical. *Content Services* is a clear example of this. Two points can be made in this respect.

First, not only is the CJEU's literal interpretation incomplete and inconsistent with the various language versions of the DSD, but it is also evidence of a wrong use of the teleological method. The CJEU interpreted the English version of the Directive and claimed that while Article 4 imposes a 'neutral' formulation of the pre-contractual obligation, namely by stating that information must be *provided* to the consumer, Article 5 operates with two essential verbs, 'to

30 See C. GULMANN, 'Methods of Interpretation of the European Court of Justice', 24. *Scandinavian Studies in Law* 1980, pp. 187–204, at 197–198; B. VAN DER ESCH, 'The Principles of Interpretation Applied by the Court of Justice of the European Communities and Their Relevance for the Scope of the EEC Competition Rules', 15. *Fordham Int'l LJ* (*Fordham International Law Journal)* 1991–1992, pp. 366–397; N. FENNELLY, 'Legal Interpretation at the European Court of Justice', 20. *Fordham Int'l LJ* 1997, pp. 656–679; V. MAK, 'Harmonisation through "Directive-Related" and "Cross-Directive" Interpretation: The Role of the ECJ in the Development of European Consumer Law', 18. *Zeitschrift für Europäisches Privatrecht* 2010, pp. 129–146.

31 Report of Mr Justice J.L. MURRAY, President of the Supreme Court and Chief Justice of Ireland, 'Methods of Interpretation – Comparative Law Method', *Actes du colloque pour le cinquantième anniversaire des Traités de Rome*, at p. 39, available online at http://curia.europa.eu/common/dpi/col_murray.pdf; see also B. VAN DER ESCH, 1991–1992, at p 368.

32 V. MAK, 2010, at p. 137.

33 *Ibid*., at p. 148; another method common for the interpretation of consumer law cases is the 'directive-related' method; see W. VAN GERVEN, 'ECJ Case-Law as a Means of Unification of Private Law', 5. *ERPL* 1997, pp. 293–308, at 301.

receive' and 'to give'. According to the Court, if we look at the ordinary meaning of words, there is quite a difference between 'to give' and 'to provide'. However, the Court does not disclose what definitions it took into account to assess this difference. The verb 'to give' entails 'to put into the possession of another for his or her use'[34] or 'to freely transfer the possession of (something) to (someone)',[35] thereby emphasizing the element of handing over or, as the CJEU correctly indicated, the activeness of the seller or supplier in the transmission process. However, 'to provide' has a more passive meaning, in the sense of 'to supply or make available',[36] which does not necessarily mean that the consumer must be handed over information but that he must simply be put in the position where this information is accessible to him.

Inconsistency then stems from the fact that different language versions were indeed taken into account when establishing the neutrality of Article 4, but the Court failed to look at other language versions when dealing with Article 5. After all, it is known that the Court does not favour one language version as more official than others, as it has itself stated: '[a]ll the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question'.[37] The overall consistency problem with the Court's interpretation arises out of the fact that not all language versions utilize equivalents of 'to give' but rather of 'to provide'.[38] This can also be seen in the Austrian legislation implementing the DSD.[39] Furthermore, the same can be noticed in the wording of Article 5(1) second sentence, stating that '*In any event* the following must be *provided* […]' (emphasis added). If this sentence is read to be the mandatory information standard that businesses must meet whether they have sent the confirmation on a durable medium or the information was already given, then why did the European legislator choose to determine the obligation through the neutral term 'provide' rather than 'given'? The Court did not look into the second sentence to determine the purpose of Article 5(1) as a whole.

Still, to clarify the interpretation of Article 5(1), the Court looked at Recital 11 of the preamble. Here it becomes clear the CJEU tried to apply the

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34 Merriam-Webster dictionary, available online at http://www.merriam-webster.com/dictionary/give.

35 Oxford Dictionary, available online at http://oxforddictionaries.com/definition/english/give?q=give.

36 Oxford Dictionary, available online at http://oxforddictionaries.com/definition/english/provide?q=provide; see also Merriam-Webster dictionary, available online at http://www.merriam-webster.com/dictionary/provide.

37 Case C-296/95, *The Queen* v. *Commissioners of Customs and Excise, ex Parte EMU Tabac and Others* [1998] ECR I-1605, para. 36.

38 See Annex 1.

39 Section 5d para. 1 *Konsumentenschutzgesetz*.

so-called radical teleological method,[40] leaving the level of language discrepancy in order to grasp the purpose of the Directive. Recital 11 does indeed acknowledge that using distance communication must not reduce the information consumers have access to; by doing so, the recital mentions three different ways of making information available to the consumer based on the verbs used – providing, sending, supplying. However, the recital does not make a hierarchy as to how exactly information must reach the consumer – what is important in the light of the Directive is that consumers are not deprived of information and, what is more, that they are not deprived of information by sellers or suppliers acting in bad faith.[41] It is for this reason that Article 5(1) should not be interpreted so narrowly as to suggest that information retrieved by the simple click of a mouse button does not meet the Directive's standards. To draw a comparison, if the consumer is provided with written confirmation via mail, he has to open the envelope to be able to read the information. The same can be argued if the consumer receives an e-mail with a PDF file containing the information and has to download the document by clicking on it. These minor actions undertaken by the consumer do not in any way contravene with the purpose of the DSD. The Court's wrong literal interpretation took precedence over a proper teleological understanding of the Directive.

Second, the definition of durable medium is taken over from directives that are not applicable to the case before the Court. This reflects a wrong use of the 'cross-directive' method of interpretation. The Court quotes Article 2(f) of the Distance Marketing Directive, Article 2(12) of the Insurance Mediation Directive (IMD), and Article 3(m) of the Consumer Credit Directive to define durable medium.[42] In the light of the principle of autonomous interpretation,[43] it is true that 'durable medium' should have a European meaning. However, at the same time one must ask whether consumer protection does not come in nuances. The referenced directives are part of the Financial Services Action Plan, and as acknowledged in Recital 9 of the Distance Marketing Directive preamble, '[t]he achievement of the objectives of the Financial Services Action Plan requires a higher level of consumer protection […]'. The separate regime for financial services can also be inferred from the DSD itself. Article 3(1) first indent clearly specifies that financial services are not to be covered by the DSD, which thereby implicitly recognizes the particular nature and special importance of the financial sector. Moreover, just by briefly comparing the DSD to the Consumer Credit

40 M. DERLÉN, *Multilingual Interpretation of European Union Law*, Kluwer Law International, The Hague 2009, at p. 47.

41 Article 4(2) DSD.

42 Case C-49/11, *Content Services Ltd* v. *Bundesarbeitskammer*, para. 44.

43 Case-75/63, *Mrs MKH Hoekstra (née Unger)* v. *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 379.

Directive, interesting differences start emerging: while the DSD only has two references to 'durable medium', the Consumer Credit Directive has 12, and while the DSD only uses the durable medium concept in connection with the confirmation of information, the Consumer Credit Directive uses it in relation to pre-contractual information, drawing up of contracts, overdraft facilities, borrowing rates, overrunning, and credit intermediaries fees. It is because financial services have a specific technical complexity raising a lot of informational problems[44] that a special regime has been created for them. It is simply unclear why the Court applies definitions based on financial services directives to a non-financial distance contract, but it goes without saying that these definitions relate to a consumer protection regime that is beyond the purposes of the DSD. Relying on cross-directive interpretation thus disregards the differences in consumer protection in different sectors.

4.2. The Court Fails to Bridge the Gap between the DSD's 'Old School' Understanding of Technology and Reality

The second major flaw of the *Content Services* judgment is about the Court's decision on whether businesses can use hyperlinks to direct consumers to information that is stored on their servers.

As it was also acknowledged by the CJEU, the DSD will be replaced with Directive 2011/83 on consumer rights as of 13 June 2014.[45] This will hopefully solve issues arising out of the fact that the DSD was not adopted as a solution for internet contracts. Not only does the Consumer Rights Directive acknowledge in Recital 5 the potential for further growth of internet sales, but it also specifically mentions the internet as a means of distance communication in Recital 20. However, until replaced, the DSD will continue to govern matters arising out of distance contracts. The Court's interpretation of 'durable medium' is in this respect not very enlightening. The issue will be addressed in three steps. Firstly, contracts and technology will be discussed from a general perspective. Secondly, the Court's reliance on the content of the durable medium concept given by three directives on financial services will be challenged. Lastly, alternative solutions will be proposed.

To start with, trading on the virtual market has led to the elimination of classical contract through postal materials, which means that a consumer can go online and conclude contracts by a simple click of a button.[46] This practice is

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44 P. CARTWRIGHT, 'Consumer Protection in Financial Services: Putting the Law in Context', in P. Cartwright (ed.), *Consumer Protection in Financial Services*, Kluwer Law International, London 1999, at p. 10.

45 Case C-49/11, *Content Services Ltd* v. *Bundesarbeitskammer*, para. 44.

46 R.S. CONKLIN, 'Be Careful What You Click For: An Analysis of Online Contracting', 20. *Loyola Consumer Law Review* 2007-2008, pp 325-347, at 325.

generally called clickwrap, and it entails that a user ticks a box to confirm he agrees with the terms and conditions and subsequently clicks himself into a contract.[47] The more aggressive version of internet contracting is known as browsewrap, where simply by using the services on a webpage or by browsing through it, a contract can be considered to have been formed.[48] The crystallization of these practices shows how the virtual market is responding to the needs of the modern consumer, who is in need of a simple way to purchase goods and services.

The shift from written to electronic contracts still raises many fascinating questions dealing with form, but perhaps the most interesting one is: do the two environments need to fulfil the same functions? The affirmative answer was submitted to the CJEU by the Austrian, Belgian, and Greek governments in the context of the *Content Services* case.[49]

Legal scholarship holds that there are three functions to legal (written) form: (1) evidentiary – requiring sufficient evidence, (2) cautionary – limiting impulsive transactions, and (3) channelling – standardizing certain types of transactions.[50] However, these functions are not likely to apply when internet contracts offer consumers the benefit of efficiency. Perhaps the most speaking example is represented by the Apple App Store: simply by attaching a credit card number to an Apple account, one can buy various applications with a single screen tap. This is to say the cautionary function not only is unfulfilled, but also there is simply no reason to rely on it, as long as transactions are kept within low-value limits. In the same vein, even if normal paper can have a lifespan of several decades, it has been pointed out that some electronic media, for instance CD-ROMs, deteriorate within as little as two years.[51]

So we can already claim that written and electronic media should only be considered similar in so far as their functions overlap. With this in mind, we will now proceed to the next step of the analysis and determine whether websites can be durable mediums.

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47 J.J. TRACY, 'Browsewrap Agreements: Register.com, Inc. v. Verio, Inc.', 11. *Boston University Journal of Science and Technology Law* 2005, pp. 164–172; D. STREETER, 'Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses', 39. *San Diego Law Review* 2002, pp. 1363–1394; C.L. KUNZ *et al.*, 'Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements', 59. *The Business Lawyer* 2003–2004, pp. 279–312.

48 G.L. FOUNDS, 'Shrinkwrap and Clickwrap Agreements: 2B or Not 2B?', 52. *Federal Communications Law Journal* 1999-2000, pp. 99–124; N.J. DAVIS, 'Presumed Assent: The Judicial Acceptance of Clickwrap', 22. *Berkeley Technology Law Journal* 2007, pp. 577–598.

49 Case C-49/11, *Content Services Ltd* v. *Bundesarbeitskammer*, para. 41.

50 S. HEDLEY, *The Law of Electronic Commerce and the Internet in the UK and Ireland*, London Cavendish Publishing, 2006, p. 251.

51 J. HORLINGS, 'CD-R's binnen twee jaar onleesbaar', *PC Active*, 20 Jul. 2004, available online at http://www.pc-active.nl/component/content/article/10508.

To define a 'durable medium', the Court borrowed a definition used in three financial services directives discussed previously.[52] This definition relies on three pillars also used by the EFTA Court in the *InconsultAnstalt* case:

> The Internet site in question must constitute an instrument which (a) enables the customer to store information addressed personally to him, (b) enables him to store such information in a way accessible for future reference for a period of time adequate to the purposes of the information, and (c) allows for the unchanged reproduction of the information stored.[53]

Assuming *arguendo* that this definition would apply to the DSD in spite of its more stringent scope over financial services, at first sight it seems quite reasonable, but a closer look to its sources leads the reader to a different direction. Since the definition's components are rather abstract, Recital 20 of the preamble of the Distance Marketing Directive and Article 2(11) second sentence of the IMD, having exactly the same content, attempt to exemplify what durable mediums are in practice:

> Durable mediums include in particular floppy discs, CDROMs, DVDs and the hard drive of the consumer's computer on which the electronic mail is stored, but they do not include Internet websites unless they fulfill the criteria contained in the definition of a durable medium.

It goes without saying that giving floppy discs as an example must simply be ignored because computers do not even have floppy disc drives anymore.[54] As for CDROMs, even if we discard the lifespan problem presented earlier, what are the chances that an online bookstore will send the consumer a CDROM or a DVD with the terms and conditions of the contract? The unfeasibility of this provision is also demonstrated by the fact that it does not even make reference to simple e-mail but to e-mail that is received on personal accounts linked to the consumer's computer, enabling the consumer to make back-ups of the data on his own personal hard drive. This would immediately leave out e-mail accounts from operators such as Gmail, Yahoo, or Hotmail because unless the user downloads all his mail, it will not make it to his own hard drive but will be stored on the e-mail company's servers. This provision did not make it into the Consumer Credit Directive, and neither is it found in the Consumer Rights Directive. Actually,

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52 See sec. 4.1.

53 Case E-4/09 *Inconsult Anstalt* v. *Finanzmarktaufsicht*, para. 32.

54 T. SPRING, 'What Has Your Floppy Drive Done for You Lately?', *PCWorld*, 24 Jul. 2002, available online at http://www.pcworld.com/article/103037/article.html.

Annex 1 of the Consumer Rights Directive makes a reference to 'durable medium (e.g., e-mail)' without adding the prerequisite of own hard disc storage. It is thus only reasonable to claim that Recital 20 of the preamble of the DMD and Article 2(11) second sentence of the IMD, first of all, impose impractically high standards for durable mediums and, second of all, relate to technology in a decrepit manner.

If we disregard the supporting text just discussed, the durable medium definition does not *per se* exclude websites. However, if they are considered to be durable mediums, what exact properties must websites have? This leads us to the third step of the argument, namely how present-day technology can be used for alternative solutions. This point is important because the Court did not take its argument any further than establishing how the website at hand (opendownload.de) cannot be considered a durable medium.

It can be agreed that a durable medium must provide the following characteristics: durability, availability, and accessibility. Meeting these requirements substantially depends on what software is used on the website. The European Securities Market Expert group (ESME), to which the EFTA Court refers, distinguishes between so-called 'ordinary' and 'sophisticated' websites, specifying that the latter category can very well be assimilated to the notion of 'durable medium'.[55] The interesting addition made by this report is PDF technology. If a consumer is sent an e-mail with a link to a PDF file, then the consumer can very well access and save the information. Moreover, it is easier to prove the content of e-mail communication since it can always be reproduced. This does not hold for postal communication, where the seller or supplier can prove to have sent an envelope to the consumer but not that the envelope actually included written confirmation in the meaning of Article 5(1).

Could the same result be achieved by simply posting information on a website? In principle, it can very well be the case. First of all, this option could be more practical for businesses operating in good faith, whose transparency in offering information is reflected by specific sections on the website dealing with terms and conditions, delivery, payment, FAQs, etc. Then, the consumer could simply be redirected to the website after the conclusion of the contract. However, it is not always the case that businesses are transparent on the internet or, what is worse, that they are consistent in their transparency. Still, even if there are businesses that change their terms and conditions within the time of contractual performance, it is unfeasible to consider that information can simply disappear into electronic thin air in an age where Google records every search made by its users and it is impossible to delete information posted on Facebook. Free internet archives such as the WayBackMachine (archive.org) can take users back to see how specific websites used to look like starting with 1996 and until the present

55 ESME, *Report on Durable Medium – Distance Marketing Directive and Markets in Financial Instruments Directive*.

day. Looked at from a more holistic view, the circulation of information on the internet does not seem as discretionary as the Court implies in the *Content Services* case. In the end, companies have access to editing their websites. However, if they do so, it must not be immediately inferred that the website is not a durable medium but that the business is simply not offering relevant information anymore.

Another alternative for operating information on websites could be the creation of user accounts where businesses can make available to the consumer certain personal information, where a consumer can keep track of his activity, etc. Such accounts are very common with Ebay and operate on multiple levels – a user not only can obtain access to general information provided by the company but also can manage personal communications. Moreover, cloud accounts such as Dropbox, Google drive, or SugarSync offer free and generous server space for users to be able to access their own data online – a sort of online hard disk drive. The account as such is under the control of the user, but the server is not; this is to say that Dropbox has the access to delete information from a user's account, but by doing so it incurs liability for privacy infringements.

6. Conclusion

That the CJEU interprets consumer directives in a pro-consumer manner is not new and has been well addressed in the academic literature.[56] Nonetheless, the *Content Services* judgment sheds new light on how the Court profiles the internet consumer, namely as vulnerable, passive and, uninformed. This profile is contrary to what polls show about cross-border trade – that consumer online confidence is on the rise.[57]

In the end, the *Content Services* case fails the test of what is compatible with the needs of technology and the modern consumer in four important ways. First, it applies a higher consumer protection regime than what can be read in the DSD, by interpreting terminological issues in a manner that discarded other language versions of the Directive than the English one. Second, it looks at financial services directives to clarify operational concepts, when financial services are known to benefit from a higher level of consumer protection due to the nature of the subject. Third, even if the definition taken from the financial

56 V. MAK, 'The Myth of the "Empowered Consumer" – Lessons from Financial Literacy Studies', TISCO Working Paper Series on Banking, Finance and Services No. 03/2012, p. 8; H. UNBERATH & A. JOHNSTON, 'The Double-Headed Approach of the ECJ concerning Consumer Protection', 44. *CMLR* 2007, pp. 1237–1284; N. REICH, 'Protection of Consumers' Economic Interests by EC Contract Law: Some Follow-up Remarks', 28. *Sydney Law Review* 2006, pp. 37–62, at 43.

57 EUROPEAN COMMISSION, 'Consumer Protection in the Internal Market', 298. *Special Eurobarometer* 2008, p. 84.

services directives was applicable, its interpretation is once again too narrow to be practically possible in the case of supplying non-financial services or selling goods. Fourth, commonly used technologies are not presented by the Court since in spite of the case's impact and widespread importance for online operators, the Court is silent on what requirements a website must fulfil to be considered a durable medium.

Annex 1

Language version/EN	**'provided' Article 4(1)**	**'receive' Article 5(1)**	**'given' Article 5(1)**	**'provided' Article 5(1) second sentence**
German	*verfügen*	*erhalten*	*erteiltwurden*	*übermitteln*
French	*bénéficier*	*recevoir*	*fournies*	*fournies*
Spanish	*disponer*	*recibir*	*facilitado*	*facilitarse*
Italian	*ricevere*	*ricevere*	*fornite*	*forniti*
Romanian	*beneficieze*	*primească*	*furnizate*	*mentioneze*
Dutch	*beschikken*	*Ontvangt*	*verstrekt*	*verstrekt*
Portuguese	*dispor*	*receber*	*fornecidas*	*fornecidos*

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